
Starbucks for President: The Disappearing Line between Government and Business as Agents for Social Change

Starbucks Presidente: desaparece la línea entre gobiernos y empresas como agentes del cambio social

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Abstract: This paper will explore the rise of corporate social advocacy (CSA) among business, including the social and legal developments that make it ripe for this engagement to take place. The analysis will also explore the potential impact of CSA on social change and democracy in the United States, including exploration of the motives of businesses engaged in such advocacy and the connection between political and social positions with consumer behavior. Lastly, this paper will identify some of the dangers of corporate advocacy in terms of its impact on the government and businesses, as well as on the voice of the people. The study also identifies various factors that may indicate whether this is a trend or a fundamental change in how companies deal with changes values-based.

Key Words: Corporate Social Advocacy, Public Values, Legal Landscapes, Government Accountability.

Resumen: Este trabajo explora el aumento de la *Corporate Social Advocacy* (CSA) entre las empresas, incluyendo el desarrollo social y legal que hace que estén maduras para que ese compromiso se lleve a cabo. El artículo también analiza el impacto potencial de la CSA sobre el cambio social y la democracia en los Estados Unidos, al igual que explora los motivos de las empresas comprometidas en esa labor de promoción y la conexión de las posiciones políticas y sociales con el comportamiento del consumidor. Por último, este trabajo intenta identificar algunos de los peligros de la *corporate advocacy* en términos de su impacto, tanto en el gobierno y las empresas como en la voz de la gente, así como varios factores que pueden indicar si se trata de una tendencia o de un cambio fundamental en el modo en que las empresas afrontan cambios basados en valores.

Palabras clave: Corporate Social Advocacy, Valores públicos, Panorama legal, Responsabilidad gubernamental.

I. INTRODUCTION

“You can’t create emotional attachment if you stand for nothing”¹, according to Howard Schultz, CEO of Starbucks. For Schultz and many other business leaders, the days of strict adherence to Milton Friedman’s shareholder primacy theory, where a company’s involvement in social issues is considered theft from shareholders, are numbered. Schultz has made it clear that the company creates value for its shareholders by living its values in every transaction, from buying a coffee farm in Costa Rica in order to establish sustainable farming to serving a customer her *grande*, non-fat, soy latte. More recently, Starbucks has voiced its values in areas such as gun control, LGBT rights, and race relations. For Starbucks and many other companies, having a social conscience now includes speaking up on important and controversial social and political issues. Even Apple, the world’s most valuable and historically tight-lipped company, has reluctantly entered the political fray over privacy: “The way I look at it is, Apple is this great American company that could only have happened here. We see it as our responsibility to stand up to something like this [government demand for the company to break encryption of terrorists iPhone] and speak up for all of these people [who] don’t have a voice”².

Apple’s public stance on privacy is part of a larger trend, although technology companies have traditionally stayed away from social policy and seem to have existed in a different world. As recently as the 2012 World Economic Forum, Apple stated its position on its involvement in American social policy: “we don’t have an obligation to solve America’s Problems”³. What has changed since then? Why are companies as diverse as Apple, Salesforce.com, Panera Bread, Walmart, and even the NBA becoming more involved in social and political issues inextricably tied to values and social change?

II. WHAT IS CSA?

U.S. business’ slow acceptance of its need to pay attention to social and other policy began in earnest in the 1970’s as a reaction to various federal labor laws that appeared to conflict with free market values⁴. Ultimately, as the

1 Carr, A. (2016).

2 Grossman, L. (2016).

3 Duhigg, C. y Bradsher, K. (2012).

government became more business-friendly, businesses began viewing Washington D.C. no longer as a necessary evil, but as a partner and source of profit for their own interests⁵. Thus, the lobbying industry flourished, focusing specifically on issues relevant to client businesses and to a lesser extent industry priorities. Traditional lobbying favors large companies because there is increased competition for political access, thus making any significant change unlikely. So, to the extent that large incumbent companies benefit from the status quo, they have an upper hand over smaller and newer entrants. Coupled with the increasing subject matter complexity of legislation, big businesses are the only players that can afford to educate legislators on their particular priorities⁶.

CSA⁷, however, lies outside the traditional role of corporate lobbying: 09 when a business speaks out on a controversial political or social issue that does not seem to fit squarely with its business or industry and appears to be driven by individual values⁸. In traditional lobbying, businesses, through their hired lobbyist, work with legislators to draft bills that are subject to many amendments and opportunities for veto⁹. CSA employs a different strategy, typically involving the CEO or other executive speaking directly with the public and/or an elected official, yet it has the potential to influence legislation in the same manner as lobbying. When Starbucks makes a public statement about carrying guns¹⁰ or Disney about inclusion and diversity¹¹ the conversation moves from Washington D.C. to the dinner table. Moreover, unlike the obscure world of Washington D.C. politics, social media has provided a direct line from CEOs and other leaders to the voting and buying public, “it’s not very hard for a CEO like myself [Marc Benioff] or Richard Branson or Michael Dell to tweet something, and one little tweet can make a huge difference”¹².

Nor does CSA fit neatly into the more traditional public relations study of “issues management.” Once considered a defensive public relations func-

4 Drutman, L. (2015).

5 Drutman, L. (2015).

6 Drutman, L. (2015).

7 Dodd, M. D. y Supa, D. W. (2014).

8 Dodd, M. D. y Supa, D. W. (2014).

9 Drutman, L. (2015).

10 Jargon, J. (2013).

11 Bronner, S.J. (2016).

12 Steinmetz, K. (2016).

tion, “issues management” is identifying gaps between what a business does and what their stakeholders expect in terms of the socio-political environment¹³. While issues management has evolved into an opportunistic and offensive strategy for many businesses¹⁴, CSA frequently involves issues that are not immediately correlated with the business’ key functions, and often reflect a desire to better society as a whole¹⁵. For example, in response to the U.S. government shut down in 2013, Howard Schultz, CEO of Starbucks, started a petition, both in stores and on the Starbucks website, calling for an end to the shutdown because “[t]he American people have no platform with which to voice their frustration”¹⁶. He asked 120 stores in the Washington D.C. area to write “come together” on coffee and beverage cups. According to Schultz’s email to partners, “Rather than be bystanders, we have an opportunity –and I believe a responsibility– to use our company’s scale for good by sending a respectful and optimistic message to our elected officials to come together and reach common ground on this important issue”¹⁷.

The idea of business taking a stand on a controversial social issue is not new. In 1964 when Dr. Martin Luther King, Jr. won the Nobel Peace Prize, the Mayor of Atlanta, Georgia was worried that no one would attend the integrated dinner the city had planned to celebrate King’s achievement. He reached out to Robert Woodruff, the former CEO of Coca-Cola, for help persuading the invitees– a list of Atlanta social elites. At that time, Coke was expanding internationally as was the stature of Atlanta, but Woodruff worried that a dismal turn out for such a prestigious honor would be an embarrassment for both the city and Coke. J. Paul Austin, the CEO of Coke at the time, had just returned from 14 years working in South Africa and saw first-hand the injustices of discrimination on both the human spirit and the local economy. When Woodruff explained the precarious issue to the CEO, Austin was quoted as saying publicly “Coca-Cola cannot stay in a city that’s going to have this kind of reaction and not honor a Noble Peace Prize winner”. The event quickly sold out¹⁸.

Fifty-two years later, Georgia faced a similar social issue regarding House Bill 757: The Free Exercise Protection Act, a bill that many felt would allow

13 Dougall, E. (2000).

14 Dougall, E. (2000).

15 Dodd, M. D. y Supa, D. W. (2014).

16 Patton, L. (2013).

17 Schutlz, H. (2012).

18 Burress, J. (2015).

religious groups to discriminate against gay people. Both chambers of the Georgia legislature passed the bill; however, several businesses expressed their opposition to the value statement made by the bill. For example, Disney and Marvel responded to the bill: “Disney and Marvel are inclusive companies, and although we have had great experiences filming in Georgia, we will plan to take our business elsewhere should any legislation allowing discriminatory practices be signed into state law”¹⁹. Joining Disney in voicing their opposition to the bill were, among others, The Home Depot, Salesforce.com, Unilever, CNN, and the National Football League. All of whom, in one way or another, expressed their concern that their organizations could no longer do business in Georgia if the bill were passed²⁰. Less than a week later, Georgia Governor Nathan Deal vetoed House Bill 757, stating “I do not think we have to discriminate against anyone to protect the faith-based community in Georgia”²¹.

A similar battle is underway in North Carolina over that state’s new Public Facilities, Privacy, and Security Act, which imposes a requirement that people use restrooms that correspond to their assigned gender at birth. This new law prevents transgendered people from using the bathroom that corresponds to the gender with which they identify²². More than 90 businesses, including Salesforce.com, Marriott, Facebook, Levi Strauss, Williams-Sonoma, and Bank of America signed a letter expressing their concern that the new law does not reflect the values of the companies or the majority of citizens of North Carolina²³. While none threatened to pull their business from the state, the signatories did make it clear that the law was “bad for business”²⁴.

III. CSA- WHY NOW?

Increasingly, corporations are engaging in CSA²⁵. A number of social, political, and legal developments have made it ripe for this engagement to take place.

19 Bronner, C. (2016).

20 Ellis, R. y Grinberg, E. (2016). The National Football League made it clear that its values are non-discrimination and inclusivity and any state laws contrary to those values will be a factor in evaluating potential Super Bowl sites. Boren, C. (2016).

21 Ellis, R. y Grinberg, E. (2016).

22 Kopan, T. y Scott, E. (2016).

23 Human Rights Campaign (2016).

24 Human Rights Campaign (2016).

1. *The Evolving Role of CEO*

The role of a CEO is evolving. The Executives at large companies are as well known for their stances on social issues as they are for their professional contributions. For example, Tim Cook's stance on gay rights has been firmly established, and Sheryl Sandberg, COO of Facebook, is probably more well-known for her very public stance on gender equality and her best seller book *Lean-In*. According to Rose Marcario, CEO of Patagonia "we're at a tipping point where businesses need to step up and take a lead with moral and ethical voices"²⁶.

Consider Salesforce.com CEO Marc Benioff. Benioff views being a CEO as a platform for advocacy: "...businesses...these are the greatest platforms for change that we have in the world. They are the greatest platform for giving. They are the greatest platform to make a difference"²⁷. Benioff made it clear during his very public opposition to Georgia House Bill 757, that he was advocating on behalf of his 20.000 employees because "they expect us to take a position and advocate on their behalf"²⁸. Benioff has a winning record in terms of social advocacy. In 2015, Benioff and Salesforce.com, among other businesses, vocally opposed Indiana's Religious Freedom Law because they felt it would allow businesses to discriminate against gay, lesbian, bisexual, and transgendered people. In addition to helping individual Salesforce.com employees transfer out of the Indiana office²⁹, Benioff took to Twitter to ask his 200.000 followers whether the company should move out of Indiana³⁰. The following month, Indiana Governor Mike Pence signed amendments to the law specifically prohibiting discrimination based on sexual orientation and gender identity³¹.

LGBT rights are just one of several various social issues attracting corporate advocacy. Presidential candidate Donald Trump has inspired over 13.000 Amazon customers to ask CEO Jeff Bezos to stop selling Trump merchandise through the online retailing platform³². This request was made after

25 Dodd, M. D. y Supa, D. W. (2014).

26 Carr, A. (2016).

27 Bort, J. (2016).

28 Steinmetz, K. (2016).

29 Riley, C. (2016).

30 Konrad, A. (2016).

31 Cook, T.; Lobianco, T. ; The Indianapolis Star y Stanglin, D. (2015).

32 Stewart, E. (2016).

a Moveon.org petition was started to ask that Macy's stop selling Trump merchandise. Macy's, in its announcement that the retailer will no longer sell Trump products, stated that Trump's statements about Mexicans and immigrants are "inconsistent with Macy's values"³³. Mark Zuckerberg, CEO of Facebook, made clear reference to Trump's value statements during the F8 Developer's Conference in April of this year. In explaining his vision that the path forward for society was through people being connected and working together rather than in isolation, Zuckerberg stated "I hear fearful voices calling for building walls and distancing people they label as others"³⁴ in clear reference to Trump's promise to build a wall on the U.S.-Mexico border. According to former Vice President Walter Mondale's speech writer, Zuckerberg's speech sounded like "the elegant part of the State of the Union address"³⁵. Talking aim at a Presidential candidate is a political statement especially because Zuckerberg was not discussing the future of Facebook, but rather the future of the world³⁶.

Starbucks, perhaps unintentionally, entered the gun control debate when the company asked customers to stop bringing guns into their stores in states where "open carry" (openly carrying a firearm) is legal³⁷. A letter was posted to the Starbucks website two days after a deadly shooting at the Washington D.C. Navy Yard that killed 12 people. Although it had been the company's policy to follow state law, this was an issue Starbucks had been struggling with and the tenor of conversations had become more aggressive over time with groups on both sides using Starbucks stores as meeting places. This created the incorrect impression that Starbucks was aligned with either group's message³⁸.

According to Salesforce.com CEO Benioff, the days of strict adherence to Milton Friedman's shareholder primacy are over: "today CEO's need to stand up not just for their shareholders, but their employees, their customers, their partners, the community, the environment, schools, everybody"³⁹. For example, Starbucks CEO Schultz's motivation behind the company's "Race Together Campaign." In 2014, Schultz was preoccupied by the recent racial

33 Lee, M. J. (2015).

34 Smith, A. (2016).

35 Luckerson, V. (2016).

36 Luckerson, V. (2016).

37 Jargon, J. (2013).

38 Jargon, J. (2013).

39 Steinmetz, K. (2016).

protests as a result of a grand jury decision not to indict Darren Wilson, the white police officer who shot and killed Michael Brown in Ferguson, Missouri. Over the course of several days and many conversations, Schultz confided that he couldn't "just run this company and not say something, not have an opinion"⁴⁰. To his employees he stated that "if we just keep going about our business and ringing the Starbucks cash register every day, then I think...we are part of the problem"⁴¹. Benioff and Schultz are not alone: both men organized networks of business leaders to deploy in strategic ways: Benioff activated his network to put pressure on the Georgia state government to fight House Bill 757 and Schultz teamed up with some of the country's largest businesses to pledge to hire 100.000 opportunity youth in an effort to address the plight of those shut out of the job market⁴².

2. Evolving Public Values

Traditionally in the U.S., the long-standing debate has been how much government involvement in business is appropriate. The roles have now reversed: how much business involvement in areas traditionally reserved for government is appropriate? At the 2012 World Economic Forum, despite Apple's lack of interest, several other leaders were debating whether business had grown more powerful than governments and some were encouraging business to "pick up the slack from the state"⁴³. As recently as 2013, many Americans thought business should stay out of political discourse⁴⁴. In 2016, however, an overwhelming majority (88%) support corporate involvement in political issues and believe businesses have the power to make social change, while 78% believe business should take a stand on social and political issues facing society⁴⁵. Research indicates that if a business takes a stance on a controversial social or political issue it runs the risk of alienating customers. In addition, once a business does take a stand on an issue, the public connects that business with that issue and if they agree with the position the greater their intention to purchase⁴⁶.

⁴⁰ Carr, A. (2015).

⁴¹ Carr, A. (2015).

⁴² Steinmetz, K. (2016).

⁴³ Foroohar, R. (2016).

⁴⁴ Dodd, M. D. (2015).

⁴⁵ Global Strategy Group (2016).

⁴⁶ Dodd, M. D. y Supa, D. V. (2014).

Opinions about the role of business are not the only thing changing among the U.S. public. Millennials, those ages 18-34, have overtaken baby boomers, those ages 51-69, as the largest living generation in the United States. Currently numbering 75.4 million, Millennials size is projected to peak at 81.8 million in 2026⁴⁷. For context, the trend in Europe is the opposite: European Millennials accounted for just 24% of the EU population in 2013 whereas US Millennials accounted for 28% of the US population at that time⁴⁸. In the EU as a whole, people aged 50 and older account for a higher percentage of the population than Millennials⁴⁹.

U.S. Millennials are not afraid to spend money. According to Accenture, U.S. Millennials currently spend \$600 billion per year and their spending is expected to grow to \$1.4 trillion per year by 2020, or 30% of total retail sales⁵⁰. Although Millennials are willing to spend their money, they have particular values and expectations when it comes to business, both as employees and customers. For example, by 2025 Millennials will account for 75% of the workforce and 90% of them want to use their skills for good. Half would be willing to take a pay cut to find work that matches their values⁵¹. Moreover, although many Millennials believe business should play a larger role in addressing social problems, many believe businesses put profits ahead of values and are willing to leave their job for work at an organization that shares their personal values. In fact, 87% believe “the success of a business should be measured in terms of more than just financial performance”⁵². Benioff sees this firsthand at Salesforce.com: “millennials...want to work for a company that has a meaning associated with it, not just a product. And I think that’s very much the new reality... they also want to know what the company stands for”⁵³.

Similar values shape Millennials’ purchasing habits. When companies support social issues, Millennials respond with increased trust (91%), loyalty (89%), and a stronger likelihood to buy that company’s products or services (89%)⁵⁴. Starbucks has thus far successfully identified the core values of its em-

47 Fry, S. (2016).

48 Stokes, B. (2016).

49 Stokes, B. (2016).

50 Donnelly, B. C. y Scaff, R. (2013).

51 Poswolsky, A. S. (2015).

52 Deloitte (2016).

53 Steinmetz, K. (2016).

54 Cahan, S. (2014).

ployees and customers: “You can’t attract and retain great people if your sole purpose is to make money, because people, especially young people, want a sense of belonging— to be part of an organization they really believe is doing great work⁵⁵. If Millennials agree with the social causes a business pursues, research indicates they will attribute to that business its stance on that cause⁵⁶. More importantly, recent research has revealed that CSA not only can shape public opinion about an issue, but also that influence can be as effective as advocacy by politicians⁵⁷.

If businesses do not embrace the value system of the largest workforce in U.S. history⁵⁸, “you’re not going to attract modern workers”⁵⁹. Marc Benioff agrees embracing a larger definition of stakeholder is a key to the financial success of the business: “When you look at the Millennials’ values system, what Millennials want, they want to have meaning in work”⁶⁰. As a result, there is an incentive for CEO’s and businesses to take controversial stands on social issues. The new workforce is expecting it, consumers will be more loyal, and CEO’s seem to be successful in galvanizing public opinion on those issues⁶¹.

3. The Evolving Legal Landscape

It is evident that many CEO’s are engaging in CSA based on their personal values and beliefs and in response to customer demand. But what about the businesses they lead- does Facebook have the same right to voice its values as Mark Zuckerberg? Can a for-profit corporation like Facebook even have values that are usually attributed to human beings? Several recent U.S. cases have empowered for-profit corporations with more free speech rights, racial identity, and the free exercise of religion, and thrust a usually esoteric corporate personhood debate into prime time.

In 2011, then-Presidential candidate Mitt Romney told people at the Iowa State Fair that “Corporations are people, my friend”⁶². The next year,

55 Carr, A. (2015).

56 Dodd, M. D. y Supa, D. V. (2014).

57 Chatterji, A. y Toffel, M. W. (2016).

58 Fry, R. (2016).

59 Steinmetz, K. (2016).

60 Bort, J. (2016).

61 Chatterji, A. y Toffel, M. W. (2016).

62 Rucker, P. (2011).

former GE CEO Jack Welch and his wife Suzy explained in a Wall Street Journal Opinion piece that “Of course corporations are people. What else would they be? Buildings don’t hire people. Buildings don’t design cars that run on electricity...”⁶³. Even television host and comedian Jon Stewart asked “If only there were some way to prove that corporations were not people: show their inability to love” (2013).

Whether a corporation has rights similar to people is a debate that dates back to the 19th century when U.S. Supreme Court Chief Justice Marshall described a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law” yet able to effect the “charitable or other useful...goals of their creators”⁶⁴. In 1986, then Chief Justice Renquist explained that “to ascribe to such artificial entities [corporations] an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality”⁶⁵. Although corporations have enjoyed certain constitutional rights such as freedom to contract, due process, equal protection, and protection under the Takings Clause, it wasn’t until 2010 when the U.S. Supreme Court decided *Citizens United v. The Federal Election Commission*⁶⁶ that the public began to take notice. *Citizens United* was the first of three cases that gave new shape and definition to the question of whether corporations can have rights and values similar to people.

a. Citizens United v. FEC

Before the 2008 Presidential Primary elections, Citizens United (CU), a non-profit group, produced a documentary entitled “Hillary: The Movie” (The Movie) using money donated almost exclusively from private individuals. The Movie was critical of Hillary Clinton’s time in service to the United States both as a Senator and as First Lady. CU had planned to run television ads promoting The Movie before the Democratic National Convention, and in anticipation of a Clinton nomination, before the presidential election. It also began negotiating broadcasting rights for the full piece through video-on-demand⁶⁷. Anticipating a legal challenge based on the Bipartisan Campaign Re-

63 Welch, J. y Welch, S. (2012).

64 Garrett, B. L. (2014).

65 Garrett, B. L. (2014).

66 *Citizens United v. Fed. Election Comm’n* (2010).

67 *Citizens United v. Fed. Election Comm’n* (2010).

form Act of 2012 (BCRA), CU preemptively asked the court to allow it to air the ads⁶⁸.

The BCRA is a federal law that restricts financial contributions from unfairly influencing politics by regulating “electioneering communications”, that is any broadcast made within “sixty days before a general election or thirty days before a primary election” which refers to an identifiable candidate for Federal office⁶⁹. The regulations place restrictions on, among other things, using general corporate funds to broadcast electioneering communications in order to sway how a viewer should vote, disclosure of the identities of those who contributed more than \$1,000 toward the production of the electioneering communication, and display of a written disclosure in advertisements that, in this case CU, is responsible for the content of the ad⁷⁰.

CU claimed the regulations violated their First Amendment rights to free speech without the required showing by the FEC of a compelling government interest that justifies the burden⁷¹. Specifically, the regulation prohibiting using corporate funds to produce the movie, CU claimed that any government interest in preventing corruption in the political process does not apply here because the movie was financed almost entirely by individual donations and will be broadcast on-demand to those that wish to see it⁷². Moreover, the movie is mostly biographical so it does not influence viewers to vote a certain way⁷³.

The FEC, on the other hand, claimed the funding restrictions are constitutional because the movie clearly advocates for voting a specific way as the film depicts Clinton as unfit for office, the funding disclosure requirements are related to the compelling government interest of preventing fraud in elections and protecting the public interest in transparency in the democratic process. In so doing, the government would be furthering the First Amendment by requiring disclosures to the public so they can make informed decisions regarding candidates⁷⁴.

68 Lindbloom, I. y Terranova, K. (2016).

69 *Citizens United v. Fed. Election Comm'n* (2010).

70 Lindbloom, I. y Terranova, K. (2016).

71 *Citizens United v. Fed. Election Comm'n* (2010).

72 *Citizens United v. Fed. Election Comm'n* (2010).

73 Lindbloom, I. y Terranova, K. (2016).

74 Lindbloom, I. y Terranova, K. (2016).

The U.S. Supreme Court, in a 5-4 decision found for CU⁷⁵. As evidence of the contentious and complicated nature of the legal issues, Justice Kennedy wrote for the majority, and Justices Scalia and Thomas and Chief Justice Roberts wrote their own concurring opinions⁷⁶, while Justice Stevens wrote for the dissent⁷⁷, and took the unusual move of reading a portion of the dissent from the bench⁷⁸. The majority reaffirmed that “speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people”⁷⁹. And, corporations have long possessed First Amendment protections, which include protection for political speech⁸⁰. However, political speech does not lose protection simply because the speaker is a corporation, “the identity of the speaker is not decisive in determining whether speech is protected”⁸¹. Like people, corporations contribute to the discussion and debate in the marketplace of ideas that the First Amendment protects⁸². Regarding the funding of speech, the court stated that whether the corporate funds have any correlation to the speech or the public’s support for the speech “is irrelevant...all speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech”⁸³.

According to the dissenting justices, in the context of democratic elections “the distinction between corporate and human speakers is significant”⁸⁴. This is so because corporations “cannot vote or run for office...and because they may be managed by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters”⁸⁵. Moreover, regulating speech based on the identity of the speaker is nothing new. For example, courts have recognized limits on the speech of public school students, prisoners, members of the Armed Forces, foreigners, and government employees. These limits are constitutionally acceptable because we recognize that in certain contexts, “the Government’s interests may be more or less compelling with respect to different classes of speakers”⁸⁶. And when it comes to corporate

75 *Citizens United v. Fed. Election Comm’n* (2010).

76 *Citizens United v. Fed. Election Comm’n* (2010), p. 372.

77 *Citizens United v. Fed. Election Comm’n* (2010), p. 393.

78 McElroy, L. (2010).

79 *Citizens United v. Fed. Election Comm’n* (2010), p. 339.

80 *Citizens United v. Fed. Election Comm’n* (2010), p. 342.

81 *Citizens United v. Fed. Election Comm’n* (2010), pp. 342-343.

82 *Citizens United v. Fed. Election Comm’n* (2010), p. 343.

83 *Citizens United v. Fed. Election Comm’n* (2010), p. 351.

84 *Citizens United v. Fed. Election Comm’n* (2010), p. 394.

85 *Citizens United v. Fed. Election Comm’n* (2010), p. 394.

86 *Citizens United v. Fed. Election Comm’n* (2010), p. 492.

speakers and campaign finance, the infringement on individual speech is less of a problem because “the ‘speakers’ are not natural persons, much less members of our political community”⁸⁷, they “have no consciences, no beliefs, no feelings, no thoughts, no desires... they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established”⁸⁸.

According to the dissent, taken to its logical conclusion, it “may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech”⁸⁹. Who is speaking when a business engages in political speech? Not the customers or employees because they don’t have any input in that decision; not the shareholders because they are too varied and dispersed; maybe the officers and directors but their fiduciary duty compels them to act in the best interest of shareholders. Thus, according to the dissent, if you prohibit the use of general corporate funds for political ads under BCRA, you aren’t infringing on anyone’s “autonomy, dignity, or political equality”⁹⁰.

b. Carnell Construction Corp. v. Danville Redevelopment & Housing Authority

Lesser known than but equally illustrative as *Citizens United* is a case out of the Fourth Circuit called *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority* (2014). In this case, the court addressed the issue of whether a corporation can assume the racial identity of its owner for purposes of discrimination.

This case stemmed from a contract dispute during the construction of a large low-income housing project in Danville, Virginia. The project was funded in part by a \$20 million grant from the Federal Housing and Urban Development Agency. The Danville Redevelopment & Housing Authority (DR&HA) solicited bids for construction and Carnell submitted a bid representing itself as a certified minority business enterprise⁹¹ because its owner is

87 *Citizens United v. Fed. Election Comm’n* (2010), p. 424.

88 *Citizens United v. Fed. Election Comm’n* (2010), p. 466.

89 *Citizens United v. Fed. Election Comm’n* (2010), p. 425.

90 *Citizens United v. Fed. Election Comm’n* (2010), p. 467.

91 In Virginia, as in most states, companies that are majority owned by African, Asian, Hispanic or Native Americans can apply for minority-owned certification through Virginia’s Small, Women and Minority Owned Business program. The program is designed to increase procurement opportunities for minority-owned businesses that participate in state-funded projects. Leonhardt, T. C. (2016).

African American⁹². Carnell won the bid and entered into a contract with DR&HA to clear the project site. As work progressed, both parties became dissatisfied with the other's performance and the relationship soured. Carnell complained of racial discrimination to DR&HA's director claiming Carnell was "being singled out as a minority contractor," and was "expected to work... for free" on "excessive" project changes⁹³. After attempts to resolve the conflict failed, DR&HA informed Carnell that they would not renew its contract for work on the project and that Carnell was to remove its equipment and employees from the work site by the following month. Carnell complied and requested reimbursement for instances of unpaid work, but DR&HA declared Carnell in default under its performance bond and Carnell sued alleging racial discrimination in terminating the contract⁹⁴.

DR&HA claimed that Carnell could not sue for racial discrimination in terminating the contract because as a corporation Carnell did not have a "race, color, or national origin" and thus was not protected by the antidiscrimination laws⁹⁵. The Fourth Circuit court disagreed. In fact, several other federal appellate courts have considered whether a corporation can assume the racial identity of its owner and have allowed minority-owned corporations to move forward with discrimination claims⁹⁶. The court stated that it would be inconsistent to deny Carnell the right to sue on the grounds that it "has no racial identity and therefore cannot be the direct target of discrimination" but at the same time allow shareholders of a corporation to sue for an injury to the corporation and not to them⁹⁷. If a corporation is certified under state law as a minority owned enterprise, then according to the court the racial identity of its owner can be imputed to the corporation and the corporation can move forward with a discrimination claim separate and apart from its minority owner⁹⁸.

c. Burwell v. Hobby Lobby Stores, Inc.

The third, and perhaps most controversial case in the trend of "enabling corporate entities to assume an increasing number of personal attributes and

92 *Carnell Const. Corp. v. Danville Redevelopment & Hous.* (2014), p. 710.

93 *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.* (2014), p. 711.

94 *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.* (2014), p. 711.

95 *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.* (2014), p. 716.

96 Leonhardt, T. C. (2016).

97 *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.* (2014), p. 714.

98 Leonhardt, T. C. (2016).

liberties”⁹⁹ is *Burwell v. Hobby Lobby* (2014)¹⁰⁰ decided by the U.S. Supreme Court in 2014, three weeks after *Carnell Construction. Hobby Lobby* is not just a case about whether corporations have religious liberties; it is also a case that “sent ripples through the national conversation on women’s rights and religion in public life”¹⁰¹.

In both cases consolidated under *Hobby Lobby*, the owners of the closely-held corporations alleged that compliance with the Affordable Care Act’s (ACA) contraceptive mandate violated their “sincere religious belief that life begins at conception”¹⁰². Specifically, under the ACA, employers with 50 or more full time employees must offer health insurance coverage that provides preventive care and screenings for women, this includes all FDA-approved contraceptives, free of charge. Although several FDA-approved contraceptives prevent an egg from being fertilized, four FDA-approved contraceptives may prevent a fertilized egg from developing further (*Burwell v. Hobby Lobby Stores, Inc.*, 2014, pp. 2764).

The Hahns, owners of Conestoga Wood¹⁰³, are Mennonites. Their religion opposes abortion and maintains that “[t]he fetus in its earliest stages...shares humanity with those who conceived it”¹⁰⁴. The Hahns believe they must run their business in accordance with their religious beliefs and “operate in a professional environment founded upon the highest ethical, moral, and Christian principles”¹⁰⁵. As a result, the Hahns sued HHS to stop the application of the contraceptive mandate insofar as it required Conestoga Wood to provide coverage for the four contraceptives that prevented an already fertilized egg from developing¹⁰⁶.

The Green family owns Hobby Lobby¹⁰⁷ an arts-and-crafts chain and Mardel which operates Christian bookstores. The family is Christian and runs their businesses in accordance with their religious beliefs and “Biblical prin-

99 Leonhardt, T. C. (2016).

100 In order to resolve inconsistent circuit decisions the U.S. Supreme Court agreed to hear two cases: *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) and *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, 724 F.3d. 377 (3d Cir. 2013).

101 Richey, W. (2014).

102 Leonhardt, T. C. (2016).

103 Conestoga Wood employs 950 people. *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2764.

104 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2764.

105 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2764.

106 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2765.

107 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2764.

ciples”¹⁰⁸. Like the Hahns, the Greens believe life begins at conception and oppose providing contraception under the ACA that prevents an already fertilized egg from developing¹⁰⁹.

Both companies challenged the ACA contraceptive mandate under the Religious Freedom and Restoration Act (RFRA). The RFRA prohibits the “government [from] substantially burdening a person’s exercise of religion”¹¹⁰. HHS contended that neither corporation nor the owners could sue under the RFRA because they are for-profit businesses, and the regulations only apply to businesses, not owners¹¹¹. Although the owners may be religious, the law only provides exemptions for religious organizations such as churches and other houses of worship¹¹².

The Court found for Hobby Lobby and Conestoga Wood. As closely-held businesses, they were entitled to the religious protection guaranteed by the RFRA. In passing the RFRA and including “persons” within the ambit of protection, Congress meant to include corporations because according to the Dictionary Act “person” includes, among other things, “corporations, companies, [and] associations”¹¹³. The Court noted that a corporation “is simply a form of organization used by human beings to achieve desired ends...when rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people”¹¹⁴. As a result, the ACA requirement that businesses cover contraceptives that prohibit development of a fertilized egg imposes a substantial burden on the companies’ exercise of religion because doing so violates the “sincerely held religious beliefs of the companies’ owners”¹¹⁵. Justice Alito, in his concurring opinion, suggested some perceived limits on this ruling by stating “these cases...do not involve publicly traded corporations... [and]...it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims [because of] numerous practical restraints”¹¹⁶.

108 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2766.

109 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2766.

110 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2767.

111 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2767.

112 Leonhardt, T. C. (2016).

113 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2768.

114 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2768.

115 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2759.

116 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2774.

Justice Ginsberg, writing in part for the four dissenting Justices, described the majority opinion as a “decision of startling breadth”¹¹⁷. As a practical matter, Ginsberg warns that “closely held is not synonymous with ‘small’...[and] Hobby Lobby’s case demonstrates that RFRA claims are indeed pursued by large corporations employing thousands of persons of different faiths whose ownership is not diffuse”¹¹⁸.

According to the dissent, RFRA does not apply to for-profit corporations. Firstly, there is no need to resort to the Dictionary Act to determine what “person’s” means because use of the Dictionary Act is only for instances where the context does not give meaning to the word in question. Here the context is clear: there is no prior case law that supports free exercise rights of for-profit corporations. Until this decision, no decision of the Supreme Court has recognized a for-profit corporation’s “qualification for a religious exemption from a generally applicable law”¹¹⁹. The reason for this makes sense, “religious organizations exist to foster the interests of persons subscribing to the same religious faith”¹²⁰. For-profit corporations, on the other hand, are sustained by workers not typically of the same religion, and they use labor to make a profit rather than spread their religious beliefs¹²¹. By law, workers’ religious beliefs cannot be part of the employment relationship in a for-profit business¹²². Thus, to allow a religion-based exemption to a for-profit employer would “operat[e] to impose the employer’s religious faith on the employees”¹²³.

IV. THE IMPACT OF CSA

1. How Might CSA Impact the Government’s Relationship with the Public?

While businesses may move faster than the government in effecting social change, the impact on the public of less government input is unclear. Although a new breed of CEO has made social advocacy a priority, the govern-

117 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2787.

118 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2797.

119 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2794.

120 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2795.

121 *Burwell v. Hobby Lobby Stores, Inc.* (2014), pp. 2795-2796.

122 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2795.

123 *Burwell v. Hobby Lobby Stores, Inc.* (2014), p. 2804.

ment has not been silent in the development of this trend, even recognizing and encouraging businesses to play a larger role in addressing social issues. In 1996 President Clinton held a Corporate Citizenship Conference to “challenge the private sector to meet social problems, without actually legislating change”¹²⁴. The Conference highlighted companies that help working families with benefits such as on-site childcare, summer camps, flex-time, and paternity leave. In discussing the impact businesses can have on social issues while at the same time making a profit, Clinton stated “I believe the power of example to change the behavior of Americans is enormous”¹²⁵.

In encouraging more participation in social and political issues, is the government avoiding their obligation to the American public or merely recognizing the reality of businesses’ place in our society? The following example, although a more typical corporate social responsibility (CSR) issue, is illustrative of the alternative process for achieving change that otherwise would be incredibly difficult and time consuming, if achieved at all, through traditional democratic means. In 2006, unlikely partnerships formed between large corporations and environmental activists. The *New York Times* described these alliances as “a new spirit of compromise”¹²⁶. Many collaborations were borne out of necessity, due to the slow pace of adopting regulations. As the acting assistant administrator of the Environmental Protection Agency’s Office of Prevention, Pesticides, and Toxic Substances stated “regulation could take years,” so by inviting environmentalists and large corporations to come together, the government capitalized on the new relationships and achieved through détente what they could not achieve through the democratic process¹²⁷. As a result, “environmentalists no longer expect Washington to tackle global warming”¹²⁸, because many “find it easier to lobby corporate executives than to lobby politicians”¹²⁹. However, because many resolutions were negotiated outside of the democratic process, environmentalists and the public are left without legal recourse if a corporation changes its strategy and decides not to do what it promised as one “cannot sue companies for violating laws that don’t exist”¹³⁰.

124 Mitchell, A. (1996).

125 Mitchell, A. (1996).

126 Deutsch, C. H. (2006).

127 Deutsch, C. H. (2006).

128 Deutsch, C. H. (2006).

129 Reich, R. B. (2008).

130 Deutsch, C. H. (2006).

Corporations are bound to change their strategies to satisfy shareholders otherwise they will lose investors. And without laws specifying what is expected of corporations, businesses will do the bare minimum to compete for customers and satisfy shareholders¹³¹. In discussing the impact of CSR on democracy, Reich points to decreased confidence in our government as one catalyst for turning to business to provide leadership rather than our elected officials¹³². Although CSA is different than CSR in many respects, chief among them that in much CSA the executive is the instigator of advocacy on a topic that has little to do with their business and more to do with social justice, Reich's ideas about the impact on democracy are germane to analysis of the impact of CSA.

According to Reich, cynicism about the government is familiar; however, cynicism can also be a "self-fulfilling prophecy, diverting attention from reforming it"¹³³. Cynicism about the government is at a twenty-five year high: according to a 2015 Pew Research poll, only 19% of Americans trust the government always or most of the time¹³⁴. In general, the public believes the government is poorly managed; only 20% say it runs its programs well, and 59% say it needs "very major reform"¹³⁵. Conversely, 83% say business is intelligent compared with 67% for the government, while 45% view business as honest and only 29% view government as honest. Elected officials are also viewed as lazier than business (48% versus 29%) and more selfish (72% versus 67%)¹³⁶. Coupled with the 78% who believe business should take a stand on social and political issues facing society¹³⁷ it is easy to see how CSA has increased and why government reform may be a distant memory.

If the public expects businesses to take action on social justice issues, it is important to remember that the needs of the consumer are not the same as the needs of the electorate and corporate executives do not have the authority to "balance profits against the public good. Nor do they have any expertise in making such moral calculations"¹³⁸. The only gauge businesses have is their bottom line, which is not an indicator of social justice for a community of pe-

131 Reich, R. B. (2008).

132 Reich, R.B. (2008).

133 Reich, R. B. (2008).

134 Pew Research Center (2015).

135 Pew Research Center (2015).

136 Pew Research Center (2015).

137 Global Strategy Group (2016).

138 Reich, R. B. (2008).

ople. Moreover, there is “no means for determining the social obligations of the private sector other than through the democratic process”¹³⁹. Pressuring businesses to take a stand on social justice issues “is an unaccountable mechanism for deciding complex social issues better left to legislators”¹⁴⁰. Recent history shows us that topics such as gay rights, abortion and gun control are topics the American public has debated and struggled with, some struggles making their way to local legislatures and courts, who are in a better position to weigh the impact of such topics on the public than a private business¹⁴¹.

Take Georgia House Bill 757, for example. Both chambers of the Republican controlled Georgia legislature passed the bill, which according to Georgia House Speaker Dennis Ralston was “a good faith compromise” that included “clear anti-discrimination language”¹⁴². Speaker Ralston regrets that critics ignored the merits of the bill and didn’t take the time to understand the legal issues involved¹⁴³. If by “critics” Speaker Ralston means the many businesses that opposed the bill, they don’t have to take the legal considerations into account, nor do they have to take into account the fact that the bill went through the democratic process to reach the Governor’s desk. While the Governor’s veto is also part of the democratic process, it cannot be ignored that the bill was vetoed in the midst of public controversy with similar bills in Indiana and North Carolina and after significant pressure from businesses and the National Football League¹⁴⁴.

Indiana’s Religious Freedom and Restoration Act faced similar criticism from the business community, including Salesforce.com’s Benioff asking his Twitter followers whether the company should move out of Indiana¹⁴⁵, to threats from the California Endowment, one of the largest health foundations in the country, to sell its stock in Indiana-based Eli Lilly, Anthem, and Berry Plastics Group. In determining the fate of the bill, businesses played a key role: Governor Pence signed amendments to the bill that were negotiated in a private meeting with lawmakers and businesses, including Benioff¹⁴⁶.

139 Reich, R. B. (2008).

140 Reich, R. B. (2008).

141 Reich, R. B. (2008).

142 Ellis, R. y Grinberg, E. (2016).

143 Ellis, R. y Grinberg, E. (2016).

144 The Georgia Legislature fell just short of getting enough votes to override the Governor’s veto of HB 757. Ellis, R. y Grinberg, E. (2016).

145 Konrad, A. (2016).

146 Cook, T.; Lobianco, T.; The Indianapolis Star y Stanglin, D. (2015).

Georgia and Indiana are but two examples of how businesses become involved in social policy and justice outside normal political channels and become “politicians seeking to broker compromise among competing visions of the common good. Yet executives have no special expertise for doing this. They were hired to give consumers and investors better deals”¹⁴⁷.

By contrast, in North Carolina both the federal government and the state government have taken to the courts to determine whether H.B. 2 is constitutional¹⁴⁸. The U.S. Justice Department has asked a federal court to declare the North Carolina law unconstitutional and has threatened to withhold federal funding to the North Carolina Department of Public Safety and the University of North Carolina. North Carolina filed suit claiming that the Justice Department’s interpretation of the Civil Rights Act is “radical” and without merit¹⁴⁹. Because in a democracy state legislatures speak for the community by passing laws, it makes sense that the appropriate place to challenge that voice is the court system, whose job is the interpret those laws.

2. *How Might CSA Impact Government Accountability?*

Not only are businesses “unfit to decide what is socially virtuous”¹⁵⁰, but also the public’s increased expectation of and reliance on corporate America to solve social problems relieves our politicians from doing their job. The more we look to business, the less we will look to government to represent community values. When Starbucks decides to “use its scale for good”¹⁵¹ the voice of the broader public cannot be heard¹⁵². Given the current demographic and ethical priorities of the Millennial generation, it seems their voice will increasingly turn to business to solve social problems. In so doing, politicians do not have to engage in the “messy work” of democracy; they do not have to take a political stand on a controversial issue because business can do it for them¹⁵³. U.S. Supreme Court Justice Ginsberg pointed out the danger of businesses taking on this role in *Citizens United*, as they “cannot vote or run

147 Reich, R. B. (2008).

148 Sterling, B. J. y; McLaughlin, E. C. y Berlinger, J. (2016).

149 Sterling, B. J. y; McLaughlin, E. C. y Berlinger, J. (2016).

150 Reich, R. B. (2008).

151 Carr, A. (2015).

152 Reich, R. B. (2008).

153 Reich, R. B. (2008).

for office...and because they may be managed by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters”¹⁵⁴.

3. *Is there Corporate Accountability for CSA?*

A new equation exists in determining the role of business in our lives and what institution speaks for the values of the community. That new equation naturally includes the public, the majority of whom thinks business can solve social problems and Millennials with their own set of values and expectations. It also includes businesses as an emerging and effective voice for social justice. But as the demand for businesses to speak up on community values increases, it seems the importance of democracy in that role may diminish. Look at Chicago Mayor Rahm Emanuel’s experience with low income unemployed youth. Chicago, like many US cities, has felt the impact of shrinking help from the state and federal government when it comes to providing opportunities for young, low income residents, particularly youth of color. When a coalition of big businesses, spearheaded by Starbucks and including companies like Macy’s Target, JP Morgan Chase, and Microsoft stepped in with a pledge to provide apprentice and training programs for this group of young people, Mayor Emanuel stated “Both Illinois and the federal government are AWOL when it comes to our adolescents”¹⁵⁵.

Once a company speaks on a social or political issue, we know that they will be associated with that issue¹⁵⁶. We also know that businesses are effective in galvanizing support for whatever issue they are advocating¹⁵⁷. That galvanization may create unrealistic expectations of the public. For example, in 2013 Facebook COO, Sheryl Sandberg released her bestselling book *Lean In*. In her book, Sandberg uses research and personal stories to highlight the inequities women face at work and offers suggestions on how to overcome workplace obstacles. Based on her outspoken advocacy, many feel Sandberg is now an expert on women’s empowerment, so much so that in 2014 when the U.S. Senate was debating whether to raise the federal minimum wage from \$7.25 per hour to \$10.10 per hour some wondered why Sandberg wasn’t speaking up on this issue given the minimum wage would impact women

154 *Citizens United v. Fed. Election Comm’n* (2010), p. 394.

155 Madhani, A. (2015).

156 Dodd, M. D. y Supa, D. W. (2014).

157 Chatterji, A. y Toffel, M. W. (2016).

158 Payne, E. (2014).

disproportionately¹⁵⁸. When Facebook raised its minimum wage requirement for contractors and vendors, Sandberg did not comment on minimum wage as a national policy, but she did state that minimum wage is important for women who “comprise about two-thirds of minimum wage workers nationally”¹⁵⁹. Facebook and other Silicon Valley businesses face similar criticism. After being so vocal in its opposition to bills in Indiana, Georgia, and North Carolina that seemed to allow for discrimination, many are now questioning their commitment to progressive issues because most of the same companies are sponsoring the Republican National Convention¹⁶⁰.

CONCLUSION

What happens when a corporation does not want to take a particular position anymore? If a public position threatens to alienate investors, businesses are sure to change their strategies to better align with investor priorities¹⁶¹. As Starbucks’ CEO Schultz stated, his obligation “is first and foremost...as a fiduciary of our shareholders”¹⁶². Consumers could choose not to patronize businesses that do not share their values, and it seems Millennials prioritize values when purchasing and choosing employment. But while the public has a short memory, political institutions do not¹⁶³. And because businesses are not part of the democratic process yet have disproportionate influence on social issues, there is no accountability for the issues they choose to support. Recent legal decisions have reinforced and expanded the ability of corporations to assume rights and express values usually attributed to humans. But in *Citizens United* and *Hobby Lobby* the dissenting justices warn that because corporations are not part of the political process, cannot vote, and do not have a conscience, it would be a dangerous mistake to allow them to assume these rights. Millennials and others might agree with and even applaud business’ public opposition to laws viewed by many as discriminatory; however, there is no accountability when a business changes its strategy on CSA and the issues it chooses to pursue. The financial incentives for corporations to engage in CSA make it likely this trend will continue.

159 Salam, R. (2015).

160 Marans, D. (2016).

161 Reich, R. B. (2008).

162 Carr, A. (2015).

163 Moscardelli, V.; Praino, R. y Stockemer, D. (2013).

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tion/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/

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